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No. 88-517

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF GALVESTON, TEXAS, AND
GALVESTON RAILWAY, INC.,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS IN RESPONSE TO PETITION

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BRIEF OF RESPONDENTS IN RESPONSE TO PETITION

On September 26, 1988, petitioners City of Galveston, Texas (acting by and through the Board of Trustees of the Galveston Wharves) and Galveston Railway, Inc. filed a petition with this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the decision of that Court in *Railway Labor Executives' Association v. City of Galveston, Texas,* 849 F.2d 145. This brief is respectfully submitted by respondent Railway Labor Executives' Association [hereinafter, "RELA"] and six of its member organizations which are respondents in this case.[1]

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[1] Those individual RLEA member organizations are: Brotherhood of Maintenance of Way Employes; Brotherhood Railway Car-

Respondents agree with petitioners that the issue raised by this case is important to the entire rail industry and should be resolved by this Court. However, respondents submit that this case should not be used as a vehicle by which to resolve this issue. Rather, respondents suggest that this Court resolve the issue raised in this case by granting the writs in No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.*, and No. 87-2049, *RLEA v. Chicago & North Western Transportation Co.*, and hold this petition in abeyance until those cases are resolved.

STATUTES INVOLVED

Respondents submit that this case involves Sections 2 First and 2 Seventh of the Railway Labor Act, 45 U.S.C. §§ 152 First and 152 Seventh,[2] in addition to those provisions cited by petitioners.

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men (Division of TCU); International Brotherhood of Electrical Workers; Railroad Yardmasters of America (Division of UTU); Transportation • Communications Union; and United Transportation Union.

[2] Section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First, provides as follows:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 2 Seventh, 45 U.S.C. § 152 Seventh, provides as follows:

> No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

ARGUMENT

This case, according to petitioners, presents only one question—namely, whether rail labor's suit to enforce the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, constitutes "an impermissible collateral attack" on the order of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] "approving" the sale and lease of railroad property to petitioner Galveston Railway. Petitioners assert that this Court should review that question, which they argue is important (Pet. at 10 n.7), because it has been decided by the Fifth Circuit in a manner which conflicts with applicable decisions by this Court (in particular, *Venner v. Michigan Central R.R.*, 271 U.S. 127 (1926)) and with decisions by both the Second and Eighth Circuits in *Burlington Northern R.R. v. UTU*, 848 F.2d 856 (8th Cir. 1988), *pet. for cert. pending, ICC v. UTU*, Sup. Ct. No. 88-711; *RLEA v. Chicago & North Western Transportation Co.*, 848 F.2d 102 (8th Cir. 1988), *pet. for cert. pending*, Sup. Ct. No. 87-2049; and *RLEA v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987).

While respondents disagree with petitioners' contention that there is a conflict on the collateral attack issue between the Fifth Circuit's decision in this case and decisions by this Court and by the Eighth and Second Circuit upon which petitioners rely,[3] respondents submit that there is a conflict on this issue between this case and the decisions by the First Circuit in *RLEA v. Guilford Transportation Industries, Inc.*, 1st Cir. No. 87-1774, decided

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[3] For example, the Eighth Circuit did not address the collateral attack issue in *Burlington Northern* or *Chicago & North Western*, but, as relevant here, concluded that the Railway Labor Act's major dispute resolution procedures were superseded by the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* Rail labor respectfully submits that this conflict of laws issue is separate from, although related to, the collateral attack issue and needs to be resolved separately, albeit concurrently with the collateral attack issue.

January 20, 1988 (unpublished), *pet. for cert. pending*, Sup. Ct. No. 87-1911, and in *BLE v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986). However, as respondent RLEA pointed out in its petition for a writ of certiorari in *Guilford Transportation Industries*, rail labor submits that the *Guilford* case presents the best vehicle to decide the collateral attack issue, as well as the conflict of laws issue, for several reasons.

According to petitioners, the collateral attack on an ICC order occurs because the Commission's class exemption in *Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985), *aff'd sub nom. Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table), as well as the exemption exercised in this case, would be nullified if a court enforced the Railway Labor Act's notice, bargaining and status quo obligations. The validity of that assertion is presented by RLEA's first question in *Guilford*, although the class exemption and regulatory provision from which the Guilford carriers' were exempted are different than those involved here. However, it is that difference in regulatory provisions between this case and *Guilford* that makes *Guilford* an attractive test case.

In *Guilford*, the railroads exercised a class exemption which the ICC had given to all affiliated railroads to consummate intracorporate family financial transactions within the scope of 49 U.S.C. § 11343(a),[4] whereas the regulatory provision from which petitioner Galveston Railway was exempted in this case is 49 U.S.C. § 10901. The relevant distinction between the two regulatory provisions is that Section 11347, when read in conjunction with 49 U.S.C. § 10505(g)(2), requires the ICC to im-

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[4] That class exemption was granted in *Ex Parte No. 282 (Sub-No. 3), Railroad Consolidation Procedures*, 363 I.C.C. 200 (1980).

pose employee protective conditions upon all approvals of Section 11343(a) transactions, or their exemptions from regulation, whereas Section 10901 leaves that matter (*i.e.*, whether or not to impose employee protective provisions) to the discretion of the Commission. In *Guilford*, the ICC imposed provisions to protect employee interests, while in this case, that agency has not imposed employee protective conditions.

This distinction is highly relevant to the decision that this Court must make as to which of the pending petitions raising the various issues arising from the conflict between the Railway Labor Act and the Interstate Commerce Act should be granted. If this Court were to decide the collateral attack issue in a case in which the ICC had not imposed employee protective conditions, such as this case, and if it were concluded that a collateral attack was not involved, that would then leave unresolved the question of whether the imposition of employee protection by the ICC would change that conclusion. According to the First Circuit, the imposition of employee protective conditions which "authorize the carrier to proceed with the transaction before an implementing agreement has been reached" meant that an order enforcing the Railway Labor Act's status quo obligation would be, "in essence, a collateral attack upon the ICC's order." *BLE v. Boston & Maine Corp.*, *supra*, 788 F.2d at 801. *See also*, *Burlington Northern R.R. v. UTU*, *supra*, 848 F.2d at 862-63.

Since *Guilford* presents a case in which employee protective provisions were imposed that, according to the Guilford carriers, authorized them to effectuate their leases *before* agreements were reached, *Guilford* presents both the employee protective aspect of the collateral attack issue and the general collateral attack question. *Galveston Wharves*, however, presents only the general collateral attack issue. Consequently, respondents respectfully submit, Guilford is the more appropriate vehicle to review

the entire collateral attack question than is the *Galveston Wharves* case.

On the other hand, if this Court were to conclude that the employee protection aspect of the *Guilford* case made RLEA's suit a collateral attack on the ICC exemption orders, or if this Court did not reach that issue because of its resolution of any of the other questions presented in that case, this Court could still address the collateral attack issue without granting the petition in this case. This is so, respondents submit, because the collateral attack issue is presented by the second question in No. 87-2049, *RLEA v. Chicago & North Western Transportation Co.* Respondent Chicago & North Western Transportation Company raised the collateral attack issue throughout the litigation in the lower courts in that case, and the district court's decision rejecting RLEA's efforts to enforce the Railway Labor Act was premised upon its conclusion that enforcement of the labor Act would be at "odds with the ICC" exemption order in that case. Petition in 87-2049 at 7a. Thus, the issue raised in this case is also raised in No. 87-2049, and will have to be reached if this Court agrees with RLEA on the first issue and concludes that the Interstate Commerce Act does not supersede the Railway Labor Act.

In sum, respondents respectfully submit that the petitions before this Court in Nos. 87-1911 and 87-2049 present the best vehicles to resolve the collateral attack issue presented by this petition. Therefore, respondents suggest that this Court hold this case in abeyance until the decisions in Nos. 87-1911 and 87-2049 are reviewed.[5]

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[5] As RLEA pointed out in its petition's in No. 87-2049 and No. 88-464, *RLEA v. Chicago & Northwestern Transportation Co.*, the current litigation concerning the relationship between the ICC's powers over rail transportation and rail labor's bargaining rights also involves a question as to whether federal courts or boards of adjustment established under Section 3 of the Railway Labor Act, 45 U.S.C. § 153, have jurisdiction to determine what actual, ob-

CONCLUSION

For the reasons set forth herein, RLEA respectfully submits that this Court should hold this petition in abeyance until a decision is rendered in Sup. Ct. Nos. 87-2049 and 87-1911.

Respectfully submitted,

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jective working conditions must be maintained during the labor statute's bargaining processes when a carrier asserts that it has a contractual right to sell and abolish jobs. That issue is presented by the petition in No. 88-464; rail labor maintains that it should be considered by this Court along with the petitions in Nos. 87-2049 and 87-1911.